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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte JAMES SCOTT ANDERSON

Appeal 2008-6371
Application 10/663,498
Technology Center 3600

Decided¹: February 17, 2009

Before DONALD E. ADAMS, DEMETRA J. MILLS, and
JEFFREY N. FREDMAN, *Administrative Patent Judges*.

ADAMS, *Administrative Patent Judge*.

DECISION ON APPEAL

This appeal under 35 U.S.C. § 134 involves claims 1, 10-13, 16, 23-26, 34-38, 40-47, and 49-51. Claims 29-33 are “withdrawn as being directed to a non-elected invention” (App. Br. 4). Claims 2-9, 14, 15, 17-22, 27, 28,

¹ The two-month time period for filing an appeal or commencing a civil action, as recited in 37 C.F.R. § 1.304, begins to run from the decided date shown on this page of the decision. The time period does not run from the Mail Date (paper delivery) or Notification Date (electronic delivery).

39, and 48 are cancelled (Examiner's Amendment, mailed July 1, 2008, 2; App. Br. 4). We have jurisdiction under 35 U.S.C. § 6(b).

STATEMENT OF THE CASE

The claims are directed to a label assembly (claims 1, 10-13, 34-38, 40-42); a method of releasably mounting an erasable label across an edge of a generally planar wall of an open container (claims 16, 23-26); and a method of assembling a label (claims 43-47 and 49-51). Claims 1, 10, 16, 23, 34, and 43 are illustrative:

1. A label assembly comprising:

- a generally planar writing surface for receiving temporary and permanent indicia; and

- a semi-rigid core supporting said writing surface, said core defining a slot positioned and sized to releasably receive an edge of a generally planar wall of an open container such that a majority of said writing surface extends beyond said edge when edge is received within said slot, and wherein the orientation of said slot is generally parallel to said writing surface.

10. The label assembly of claim 1, wherein said writing surface comprises a front writing surface facing a first direction and a rear writing surface facing a second direction generally opposing said first direction.

16. A method of releasably mounting an erasable label across an edge of a generally planar wall of an open container, said method comprising

- providing a generally planar writing surface to receive said label, said writing surface suitable for receiving temporary and permanent indicia;
- mounting said writing surface to a semi-rigid core; and
- forming a slot within said core, said slot positioned and sized to releasably receive said edge such that a majority of said writing surface extends beyond said edge when said edge is received within said slot, and wherein the orientation of said slot is generally parallel to said writing surface.

23. The method of claim 16, further comprising:
providing a second writing surface facing a direction generally opposing that of said writing surface.
34. A label assembly comprising:
a generally planar writing surface for receiving temporary and permanent indicia; and
a semi-rigid core supporting said writing surface, said core having a thickness and generally opposing top and bottom sides, said writing surface extending from near said top side to a lower boundary,
wherein said core defines a slot within said thickness, said slot extending upward from said bottom side to a depth terminating near said lower boundary of said writing surface such that a majority of said writing surface extends beyond and generally above said slot.
43. A method of assembling a label, comprising:
providing a generally planar writing surface suitable for receiving temporary and permanent indicia;
mounting said writing surface to a semi-rigid core, said core having a thickness and generally opposing top and bottom sides, such that said writing surface extends from near said top side to a lower boundary; and
forming a slot within said thickness, said slot extending upward from said bottom side to a depth terminating near said lower boundary of said writing surface such that a majority of said writing surface extends beyond and generally above said slot.

The Examiner relies on the following prior art references to show unpatentability:

Weller	US 3,526,050	Sep. 1, 1970
Schmeida	US 5,727,818	Mar. 17, 1998
Downing	US 6,604,789 B1	Aug. 12, 2003

The rejections as presented by the Examiner are as follows:

1. Claims 1, 10-13, 16, and 23-26 stand rejected under 35 U.S.C. § 103(a) as unpatentable over Downing.

2. Claims 34-38, 40-47, and 49-51 stand rejected under 35 U.S.C. § 103(a) over the combination of Weller and Schmeida.

We affirm.

PRINCIPLES OF LAW

In proceedings before the Patent and Trademark Office, the Examiner bears the burden of establishing a prima facie case of obviousness based upon the prior art. *In re Fritch*, 972 F.2d 1260, 1265 (Fed. Cir. 1992). On appeal to this Board, Appellant must show that the Examiner has not sustained the required burden. *See* (1) *Ex parte Yamaguchi*, <http://www.uspto.gov/web/offices/dcom/bpai/prec/fd074412.pdf>, slip op. at 5 and 23 (BPAI Aug. 29, 2008) (precedential); (2) *Ex parte Fu*, <http://www.uspto.gov/web/offices/dcom/bpai/prec/fd080601.pdf>, slip op. at 5 and 20 (BPAI Mar. 31, 2008) (precedential); (3) *Ex parte Catan*, <http://www.uspto.gov/web/offices/dcom/bpai/prec/fd070820.pdf>, slip op. at 3 and 21 (BPAI Jul. 3, 2007) (precedential), and (4) *Ex parte Smith*, <http://www.uspto.gov/web/offices/dcom/bpai/prec/fd071925.pdf>, slip op. at 4, 9 and 23 (BPAI Jun. 25, 2007).

“The combination of familiar elements according to known methods is likely to be obvious when it does no more than yield predictable results.” *KSR Int’l Co. v. Teleflex Inc.*, 550 U.S. 398, 127 S. Ct. 1727, 1739 (2007).

When there is a design need or market pressure to solve a problem and there are a finite number of identified, predictable solutions, a person of ordinary skill has good reason to pursue the known options within his or her technical grasp. If this leads to the anticipated success, it is likely the product not of innovation but of ordinary skill and common sense. In that

instance the fact that a combination was obvious to try might show that it was obvious under § 103.

Id. at 1742. It is proper to “take account of the inferences and creative steps that a person of ordinary skill in the art would employ.” *KSR*, 550 U.S. 398, 127 S.Ct. at 1741. *See also id.* at 1742 (“A person of ordinary skill is also a person of ordinary creativity, not an automaton.”). “In determining whether obviousness is established by combining the teachings of the prior art, the test is what the combined teachings of the references would have suggested to those of ordinary skill in the art.” *In re GPAC Inc.*, 57 F.3d 1573, 1581 (Fed. Cir. 1995) (internal quotations omitted).

“A patent applicant is free to recite features of an apparatus either structurally or functionally.” *See, e.g., In re Schreiber*, 128 F.3d 1473, 1478 (Fed. Cir. 1997). However, “[f]unctional’ terminology may render a claim quite broad . . . [.] a claim employing such language covers any and all embodiments which perform the recited function.” *In re Swinehart*, 439 F.2d 210, 213 (CCPA 1971) (emphasis added).

[W]here the Patent Office has reason to believe that a functional limitation asserted to be critical for establishing novelty in the claimed subject matter may, in fact, be an inherent characteristic of the prior art, it possesses the authority to require the applicant to prove that the subject matter shown to be in the prior art does not possess the characteristic relied on.

In re Best, 562 F.2d 1252, 1254-55 (CCPA 1977) (quoting *In re Swinehart*, 439 F.2d at 212-13).

“It is well settled that the mere duplication of parts has no patentable significance unless a new and unexpected result is produced.” *In re Harza*, 274 F.2d 669, 671 (CCPA 1960).

“A statement which merely points out what a claim recites will not be considered an argument for patentability of the claim.” Manual of Patent Examining Procedure (MPEP) § 1205.02.

Arguments not made are waived. *See* 37 C.F.R. § 41.37(c)(1)(vii) (“Any arguments or authorities not included in the brief or a reply brief ... will be refused consideration by the Board, unless good cause is shown.”).

The rejection under 35 U.S.C. § 103(a) as unpatentable over Downing:

With respect to the rejection over Downing, Appellant provides separate arguments for the following groups of claims: (I) claim 1; (II) claims 10, 12, and 13; (III) claim 11; (IV) claim 16; (V) claims 23; (VI) claim 24; (VII) claim 25; and (VIII) claim 26. Accordingly, we limit our discussion to representative claims 1, 10, 11, 16, 23-26. 37 C.F.R. § 41.37(c)(1)(vii).

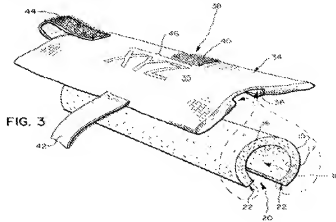
Claim 1:

ISSUE

Does Downing teach a structure that can receive temporary and permanent indicia?

FINDINGS OF FACT

FF 1. Downing teaches “[a] cushioning and protection apparatus for a chair armrest” (Downing Abstract). For clarity, we reproduce Downing’s figure 3 below:



“FIG. 3 is an isometric view of an alternative embodiment of a cushioning and protection apparatus for a chair armrest according to the present invention” (Downing, col. 2, ll. 47-49).

FF 2. The Examiner finds that

Downing teaches writing surface 35 and semi-rigid core 16 supporting the writing surface (Figure 3). The core includes slot 20 sized to releasable [sic] receive an edge upon which it is mounted. The orientation of the slot is generally parallel to the writing surface. The [c]ore (and writing surface) may correspond with “any cross-sectional shape” or armrest. Various types of indicia may be applied to the surface. If such indicia are not removed, they are considered permanent.

(Ans. 3.)

FF 3. The Examiner finds that the limitations in the claims concerning “the location of the writing surface, the edge and the open container are not part of the claimed invention. Such language is considered to be intended use only” (*id.*).

ANALYSIS

Appellant contends that “*Downing* does not teach or suggest a label assembly comprising a writing surface” (App. Br. 9). We are not persuaded. Appellant elected to define the invention using functional terminology, e.g., “a generally planar writing surface for receiving temporary and permanent indicia” (Claim 1). “[A] claim employing such language covers any and all embodiments which perform the recited function.” *In re Swinehart*, 439 F.2d at 213. *Downing* teaches a structure that is generally planar and can receive temporary and permanent indicia (FF 2). For the foregoing reasons we are not persuaded by Appellant’s contention that “disclosing any kind of apparatus having a physical surface - would be sufficient (by itself) to make Claim 1 obvious. Such a result would not make sense” (App. Br. 10). Simply stated, Appellant has not provided persuasive argument or evidence to establish that *Downing* does not meet the requirements of claim 1.

Appellant contends that “[t]he surface in *Downing* should not be considered a writing surface simply because it includes permanent indicia. . . . The presence of permanent indicia does not make every such surface a ‘writing surface’” (Reply Br. 2). While we agree with Appellant’s position that every surface that includes permanent indicia will not meet the requirements of the claimed invention, Appellant has failed to provide persuasive argument or evidence that *Downing*’s surface would *not* meet the requirements of claim 1. Accordingly, we are not persuaded by Appellant’s contention to the contrary.

Appellant contends that *Downing*’s “cushion for the armrest of a chair - [is] plainly not a suitable location for writing temporary indicia because it would be quickly smudged or erased during normal use” (Reply Br. 2). We

are not persuaded. Claim 1 requires a writing surface for receiving temporary and permanent indicia. Appellant does not dispute and therefore concedes that Downing teaches a surface that can receive permanent indicia. As for temporary indicia, claim 1 does not require the indicia to be maintained on the surface for any length of time - it is temporary. We do not find a surface that can be smudged quickly or erased during normal use to be in conflict with the term “temporary”. Accordingly, we are not persuaded by Appellant’s contention to the contrary.

CONCLUSION OF LAW

Downing teaches a structure that can receive temporary and permanent indicia.

The rejection of claim 1 under 35 U.S.C. § 103(a) as unpatentable over Downing is affirmed.

Claim 10:

ISSUE

Does Downing teach or suggest a writing surface?

FINDINGS OF FACT

FF 4. The Examiner finds that Downing teaches a writing surface wherein “one side of the core (facing the left side of the seat, for example) provides a front writing surface, and the other side (facing the right side) provides a rear writing surface” (Ans. 3).

ANALYSIS

“A statement which merely points out what a claim recites will not be considered an argument for patentability of the claim.” MPEP § 1205.02. Accordingly, we are not persuaded by Appellant’s recitation of the claim limitations of claims 10, 12, and 13. Nevertheless, for claim 10 Appellant contends that “Downing does not teach or suggest a single writing surface, or two writing surfaces” (App. Br. 10 (emphasis removed)). For claims 12 and 13 Appellant contends that “Downing does not teach or suggest any writing surface of any type” (App. Br. 11 (emphasis removed)).

We disagree for the reasons set forth above (FF 1-4) and our analysis of claim 1.

CONCLUSION OF LAW

Downing teaches or suggests a writing surface.

The rejection of claims 10 under 35 U.S.C. § 103(a) as unpatentable over Downing is affirmed. Because they are not separately argued, claims 12 and 13 fall together with claim 10. 37 C.F.R. § 41.37(c)(1)(vii).

Claim 11:

ISSUE

Does Downing teach or suggest a core and slot feature?

FINDINGS OF FACT

FF 5. The Examiner finds that “Downing does not teach a plurality of slots, however this is considered to be a duplication of known parts. It has been held that mere duplication of the essential working parts of a device

involves only routine skill in the art” (Ans. 3; *see In re Harza*, 274 F.2d at 671 (“It is well settled that the mere duplication of parts has no patentable significance unless a new and unexpected result is produced.”)).

ANALYSIS

Appellant contends that “Downing does not teach or suggest any core or slot feature” (App. Br. 11 (emphasis removed)). We are not persuaded (FF 1 and 2). Furthermore, “[i]t is well settled that the mere duplication of parts has no patentable significance unless a new and unexpected result is produced.” *In re Harza*, 274 F.2d at 671. Appellant has not provided persuasive argument or evidence that a second slot will produce new and/or unexpected results for the claimed device.

CONCLUSION OF LAW

Downing teaches or suggests a core and slot feature.

The rejection of claim 11 under 35 U.S.C. § 103(a) as unpatentable over Downing is affirmed.

Claim 16:

ISSUE

Does Downing teach or suggest the step of providing a generally planar writing surface?

FINDINGS OF FACT

FF 6. Appellant does not dispute and therefore concedes to the Examiner’s finding that “Downing does not teach the specific method steps of the instant

claims, however[,] such methods would have been obvious to one of ordinary skill in the art given the structure of Downing” (Ans. 4).

ANALYSIS

Appellant contends that “Downing does not teach or suggest the step of ‘providing a generally planar writing surface’” (App. Br. 11). We are not persuaded for the reasons set forth above (FF 1-4 and 6) and our analysis of claim 1.

CONCLUSION OF LAW

Downing teaches or suggests the step of providing a generally planar writing surface.

The rejection of claim 16 under 35 U.S.C. § 103(a) as unpatentable over Downing is affirmed.

Claims 23, 25, and 26:

ISSUE

Does Downing teach or suggest the step of providing a generally planar writing surface?

FINDINGS OF FACT

FF 7. Appellant does not dispute and therefore concedes to the Examiner’s finding that “Downing does not teach a specific material to be used for the writing surface, however[,] vinyl is old and well known” (Ans. 3).

ANALYSIS

“A statement which merely points out what a claim recites will not be considered an argument for patentability of the claim.” MPEP § 1205.02. Accordingly, we are not persuaded by Appellant’s recitation of the claim limitations of claims 23, 25, and 26. Nevertheless, for claim 23 Appellant contends that “Downing does not teach or suggest a single writing surface, or two writing surfaces” (App. Br. 12 (emphasis removed)). For claims 25 and 26 Appellant contends that “Downing does not teach or suggest any writing surface of any type” (*id.*).

We disagree for the reasons set forth above (FF 1-4 and 6) and our analysis of claim 1.

Further we recognize Appellant’s contention that Downing does not teach or suggest “the step of ‘printing permanent indicia upon an area of said writing surface’” are required by claim 25 or “a vinyl-coated writing surface . . . for removably receiving water-soluble indicia” as required by claim 26 (App. Br. 12 (alteration original)). We are not persuaded. Instead, we find not error in the Examiner’s finding that “[v]arious types of indicia may be applied to the surface. If such indicia are not removed, they are considered permanent” (FF 3). In addition, we find no error in the Examiner’s conclusion that “[i]t would have been obvious to a person having ordinary skill in the art to utilize vinyl as a suitable material if it is desired to place water-soluble indicia on the display” (Ans. 4).

It is proper to “take account of the inferences and creative steps that a person of ordinary skill in the art would employ.” *KSR*, 550 U.S. 398, 127 S.Ct. at 1741. *See also id.* at 1742 (“A person of ordinary skill is also a person of ordinary creativity, not an automaton.”). “In determining whether

obviousness is established by combining the teachings of the prior art, the test is what the combined teachings of the references would have suggested to those of ordinary skill in the art.” *In re GPAC Inc.*, 57 F.3d at 1581.

CONCLUSION OF LAW

Downing teaches or suggests the step of providing a generally planar writing surface.

The rejection of claims 23, 25, and 26 under 35 U.S.C. § 103(a) as unpatentable over Downing is affirmed.

Claim 24:

ISSUE

Does Downing teach or suggest a core and slot feature?

ANALYSIS

Appellant contends that “Downing does not teach or suggest any core or slot feature” (App. Br. 12 (emphasis removed)). We are not persuaded (FF 1, 2, 5, and 6). Furthermore, “[i]t is well settled that the mere duplication of parts has no patentable significance unless a new and unexpected result is produced.” *In re Harza*, 274 F.2d at 671. Appellant has not provided persuasive argument or evidence that a second slot will produce new and/or unexpected results for the claimed device.

CONCLUSION OF LAW

Downing teaches or suggests a core and slot feature.

The rejection of claim 24 under 35 U.S.C. § 103(a) as unpatentable over Downing is affirmed.

The rejection under 35 U.S.C. § 103(a) over the combination of Weller and Schmeida:

With respect to the rejection over Weller and Schmeida, Appellant provides separate arguments for the following groups of claims: (I) claims 34-38 and 40-42 (II) claims 43-47 and 49-51. Accordingly, we limit our discussion to representative claims 34 and 43. 37 C.F.R. § 41.37(c)(1)(vii).

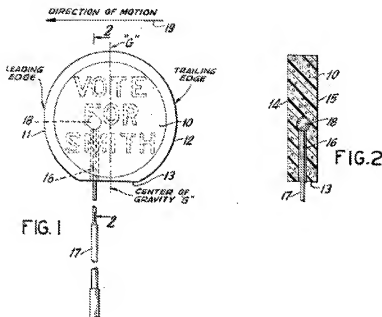
Claim 34:

ISSUE

Does the combination of Weller and Schmeida teach a semi-rigid core having a slot as required by Appellant's claim 34?

FINDINGS OF FACT

FF 8. Weller teaches “[a]n emblematic article or medallion” (Weller, col. 1, l. 10). For clarity, we reproduce Weller’s figures 1 and 2 below:



“FIGS. 1 and 2 are illustrative of one embodiment of a substantially flat medallion of foam plastic for use with an automobile antenna, FIG. 2 being a cross section taken along line 2-2 of FIG. 1” (Weller, col. 1, ll. 67-70).

FF 9. The Examiner finds that

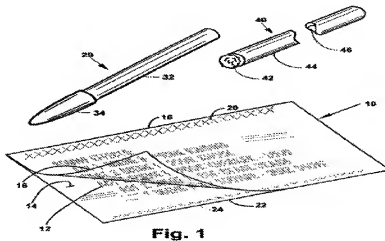
Weller teaches an assembly including generally planar surfaces 14, 15 (Figures 1 and 2) for receiving indicia, semi-rigid core 10 supporting the writing surface and having a thickness and top and bottom sides, and slot [(e.g., “an aperture, blind hole or recess” (Weller, col. 2, ll. 39-40))] 16 (Figure 2) extending upward from the bottom side to a depth terminating near the lower boundary of the writing surface such that a majority of the writing surface extends above the slot (Figure 1).

(Ans. 4; *see also* Weller, col. 2, ll. 48-52 (“By employing foam plastic in the construction of the medallion, the top of the antenna can be

pushed into the aperture since the foam plastic is sufficiently yieldable and resilient” (e.g., semi-rigid))).

FF 10. The Examiner finds that “Weller teaches surfaces 14 and 15 for receiving indicia but does not specifically describe writing surfaces” (*id.*).

FF 11. Schmeida teaches “[a] labeling system and kit therefore that includes a writing surface for dry-erase markers” (Schmeida, Abstract). For clarity, we reproduce Schmeida’s figure 1 below:



“FIG. 1 illustrates a label kit of this invention in a perspective view” (Schmeida, col. 3, ll. 36-37).

FF 12. The Examiner finds that “Schmeida teaches a dry-erase (whiteboard) writing surface for applying indicia to a substrate and includes releasably adhered transparent cover 16 (Figure 1)” (Ans. 4).

FF 13. The Examiner finds that “[i]f the indicia are not removed, it is considered to be permanent” (*id.*).

ANALYSIS

Appellant contends that “neither *Weller* nor *Schmeida* teach or suggest a semi-rigid core, as claimed” (App. Br. 13 (emphasis removed)).

We disagree. In the combination of Weller and Schmeida, Weller's element 10 is reasonably interpreted as semi-rigid (e.g., a yieldable yet resilient foam plastic) core (FF 9; Ans. 6). Accordingly, we disagree with Appellant's contention that "[w]ithout the teaching or suggestion of a core element, there can be no teaching or suggestion of a slot element within such a core" (App. Br. 14). In the combination of Weller and Schmeida, Weller's element 16 is a slot in a semi-rigid core (FF 9; Ans. 6).

Appellant contends that "[a] slot, by definition, is not cylindrical. A slot is defined [as] a 'long and narrow opening or groove.' Webster's Third New International Dictionary, Unabridged (Merriam-Webster, 2002). Weller discloses a simple hole, and teaches nothing about a slot" (App. Br. 14 (emphasis removed)). We are not persuaded.

Claim 34 defines the slot as "extending upward from said bottom side to a depth terminating near said lower boundary of said writing surface such that a majority of said writing surface extends beyond and generally above said slot" (Claim 34). As illustrated in Weller's FIG. 1, an apperature, blind hole or recess (e.g., a slot) 16 is present in the device (FF 8 and 9). This slot extends from the bottom side of the device to a depth terminating near a lower boundary of a writing surface such that a majority of the writing surface extends beyond and generally above the slot (*id.*). Absent evidence to the contrary, which there is none, we find that Weller's apperature, blind hole, or recess meets the requirements of Appellant's definition of a slot, e.g., it is a long and narrow opening or groove. In sum, Appellant has provided no persuasive evidence or argument that distinguishes their claimed invention from that of the combination of Weller and Schmeida.

CONCLUSION OF LAW

The combination of Weller and Schmeida teaches a semi-rigid core having a slot as required by Appellant's claim 34.

The rejection of claim 34 under 35 U.S.C. § 103(a) over the combination of Weller and Schmeida is affirmed. Because they are not separately argued, claims 35-38 and 40-42 fall together with claim 34. 37 C.F.R. § 41.37(c)(1)(vii).

Claim 43:

ISSUE

Does the combination of Weller and Schmeida teach a semi-rigid core having a slot and the step of mounting a writing surface to a semi-rigid core as required by Appellant's claim 43?

ANALYSIS

For the reasons set forth above, we have already found that the combination of Weller and Schmeida teaches a semi-rigid core having a slot. Accordingly, we are not persuaded by Appellant's contentions to the contrary (*see* App. Br. 14-15).

Appellant contends that

Weller discloses a one-piece molded plastic medallion having no writing surface and no core element. . . . Schmeida discloses an adhesive label; also having no core element. . . . Because there is no core element disclosed in either reference, there can be no teaching or suggestion of the step of 'mounting said writing surface to a semi-rigid core' as recited in claim 43.

(Id. (emphasis removed); *see also* Reply Br. 3.)

For the reasons set forth above, we disagree with Appellant's contention that the combination of Weller and Schmeida fails to teach a semi-rigid core. Further we recognize Appellant's reference to "Weller, at col. 4, lines 16-24" to support the contention that "[t]he 'core 10 in Weller is a hollow space – not a physical element" (Reply Br. 3). However, we are not persuaded. The portion of Weller's disclosure, relied upon by Appellant, does not refer to element 10 of Weller's FIGs. 1 or 2, but instead discloses "a fragmented portion of a mold [as] is shown in FIG. 9" which is "for molding foam plastic" cores (Weller, col. 4, ll. 12-13 and col. 2, ll. 5-6). Simply stated, despite Appellant's contention to the contrary, Weller's FIG 2 illustrates that Weller's core is *not* a hollow space.

To the extent that Appellant disagrees with the Examiner's conclusion that it would have been *prima facie* obvious to a person of ordinary skill in this art at the time the invention was made to apply Schmeida's label to Weller's core; we find that it is proper to "take account of the inferences and creative steps that a person of ordinary skill in the art would employ." *KSR*, 550 U.S. 398, 127 S.Ct. at 1741. *See also id.* at 1742 ("A person of ordinary skill is also a person of ordinary creativity, not an automaton."). Accordingly, we disagree with Appellant's intimation to the contrary.

CONCLUSION OF LAW

The combination of Weller and Schmeida teaches a semi-rigid core having a slot and the step of mounting a writing surface to a semi-rigid core as required by Appellant's claim 43.

The rejection of claim 43 under 35 U.S.C. § 103(a) over the combination of Weller and Schmeida is affirmed. Because they are not

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separately argued, claims 44-47 and 49-51 fall together with claim 43. 37
C.F.R. § 41.37(c)(1)(vii).

TIME PERIOD FOR RESPONSE

No time period for taking any subsequent action in connection with
this appeal may be extended under 37 C.F.R. § 1.136(a).

AFFIRMED

Ssc:

JAMES SCOTT ANDERSON
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